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December 13, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 17, 2007

Case Number: TSO-0528

This Decision considers the eligibility of TR at 43. XXXXXX XXXXXX (hereinafter referred to as "the individual"), to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As explained below, it is my decision that the individual should not be granted an access authorization.

I. BACKGROUND

The individual is an employee of a Department of Energy (DOE) contractor (the DOE Contractor) who has requested an access authorization for the individual. In May 2006, the DOE conducted a personnel security interview (the 2006 PSI) with the individual concerning information collected during his background investigation.

In June 2007, the Manager of the DOE area office where the individual is employed (the Manager) issued a Notification Letter to the individual. The Notification Letter indicates security concerns under Sections 710.8(k) and (l) of the regulations governing eligibility for access to classified material. With respect to Criterion (k), the Notification Letter indicates that at his 2006 PSI, the individual admitted using marijuana in the 1990's. He also presented conflicting testimony concerning when he last used marijuana, and concerning whether he ever failed a drug test.

Criterion (l) concerns information that an individual has engaged in unusual conduct or is subject to any circumstances which tend to

show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.

With respect to Criterion (1), the Notification Letter refers to the following derogatory information that raise concerns about the individual's inability to manage his finances:

A. The individual confirmed that in 1996 or 1997 his automobile had been repossessed by his credit union after loan payments became two or three months delinquent. He acknowledged that in November 2002, his credit union obtained a \$6,628 judgment against him in the county court for the unpaid balance he owed on his car loan.

B. The individual indicated that a \$253 collection account, posted in 2003 was likely a physician's bill.

C. The individual stated that he is unsure what comprises an \$1121 entry posted in 2002, by another collection agency.

D. The individual confirmed that he was indebted to the Internal Revenue Service "last year or year before last," but asserted that he has retired that debt.

Enclosure 1 to June 2007 Notification Letter.

The individual requested a hearing to respond to the security concerns raised in the Notification Letter. The hearing was convened on October 30, 2007 (hereinafter the "Hearing"), and the testimony focused on the individual's efforts to clarify his history of marijuana use and to demonstrate that he has reformed from that use. The testimony also focused on his efforts to show that he has reformed from his past financial irresponsibly, and that his current financial situation is sufficiently stable to mitigate any Criterion (1) concerns.

II. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the Hearing Officer. As discussed below, Part 710 clearly places upon the individual the

responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the Hearing Officer to base all findings relevant to this eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6) and 710.27(b), (c) and (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. The standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). Personnel Security Review (Case No. VSA-0087), 26 DOE ¶ 83,001 (1996); Personnel Security Hearing (Case No. VSO-0061), 25 DOE ¶ 82,791 (1996), *aff'd*, Personnel Security Review (VSA-0061), 25 DOE ¶ 83,015 (1996). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence which could mitigate security concerns.

Nevertheless, the evidentiary burden for the individual is not an easy one to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to his own testimony, we

generally expect the individual in these cases to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the Hearing Officer that restoring access authorization is clearly consistent with the national interest. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 (1995); Personnel Security Hearing (Case No. VSO-0038), 25 DOE ¶ 82,769 (1995) (individual failed to meet his burden of coming forward with evidence to show that he was rehabilitated and reformed from alcohol dependence).

B. Basis for the Hearing Officer's Decision

In personnel security cases under Part 710, it is my role as the Hearing Officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

III. HEARING TESTIMONY AND DOCUMENTARY EVIDENCE

At the Hearing, testimony was received from seven persons. The DOE Counsel presented the testimony of the personnel security specialist who interviewed the individual in 2006. The individual testified and presented the testimony of his brother, his foreman, a friend/co-worker, a former foreman/social acquaintance, and a co-worker.

A. The DOE Security Specialist

The DOE Security Specialist testified that he is a senior security analyst who has worked as a DOE personnel security specialist since 1987. The security specialist stated that on the individual's April 2005 Questionnaire for National Security Positions (QNSP), the individual indicated that he last used marijuana during the period April 1999 through November 2000. The security specialist also stated that the individual's credit report included unpaid debts that were in collection, and a substantial debt that the

individual owed to his former credit union involving the repossession of a vehicle. TR at 14.

The security specialist testified that at the 2006 PSI, the individual was very vague about his past use of marijuana, and appeared reluctant to provide any specifics. The security specialist stated that the individual stated at the PSI that he last used marijuana in high school in about 1992 and could not explain the dates of 1999 and 2000 that he provided in his QNSP. TR at 15-16. The security specialist testified that, based on the individual's vagueness and his "lack of commitment to give me firm details," he believed that there was a concern that the individual could still be an occasional user of marijuana. TR at 17.

The security specialist stated that the individual had a DOE drug test on November 9, 2004, and a DOE random drug test on May 21, 2007. Both of the tests were negative for marijuana and other illegal drugs. TR at 19-20. See DOE Exhibit 8.

With respect to the individual's financial problems, the security specialist stated that at the 2006 PSI, the individual told him that he is not a good money manager because he lacks training and experience in financial matters. TR at 35-36. He stated that the individual's most significant financial issue involved the 1999 repossession of his car, and his credit union's subsequent efforts to collect approximately \$6,000 that remained on his car loan. The security specialist testified that when the individual stopped making payments, the credit union went to court and got a judgment against him for \$6,628 in 2002. He stated that subsequent to this judgment, the individual had agreed to pay off his debt to the credit union at the rate of \$100 dollars per month. The security specialist stated that the individual reported to him at the 2006 PSI that he made only a few payments, before stopping, and that no payments were made for several years. TR at 31. The security specialist stated that in October 2006, the individual provided DOE with documentation that he had entered into a new agreement with the credit union in which he agreed to pay \$130 a month on his outstanding debt. TR at 34.

The security specialist testified that, at the time of the May 2006 PSI, DOE security requested that the individual complete a personal financial statement that sketches out monthly income and expenses. TR at 35. He stated that the statement that the individual completed did not provide definitive information about whether the individual and his household were "ahead, behind or breaking even" on a monthly basis. TR at 37. He stated that DOE security asked

the individual for another statement, which he provided in October 2006. The security specialist stated that

once again, [it] is not a complete response; there's information that's not addressed at all.

TR at 37. DOE exhibits 9 and 10.

B. The Individual

The individual stated that he began working for the DOE contractor in November 2004 and that he began the application process for a security clearance shortly thereafter. TR at 106. The individual testified that he was not being dishonest when he stated at the 2006 PSI that he could not recall the last time he used marijuana.

Just because I cannot remember a date, I mean, I don't understand - How does that sit on my life? Just because I can't remember a date. I can't pinpoint a situation that happened way back. I am a forgetful person, you ask anybody, any of my friends, or whatever. It hurts me to sit and hear somebody . . . count me as untrustworthy and not honest over something that happened years ago.

TR at 22-23. The individual stated that he would have been lying at the PSI if he had said that he could remember his last use of marijuana. TR at 26. He described his past use of marijuana as follows:

It's part of growing up. We were younger, I guess you try things, you know. And I knew it was wrong. I mean I tried it and then I didn't like it and I don't do it at all.

TR at 27.

The individual stated that, during high school, he would occasionally smoke marijuana at parties. TR at 111. The individual stated that he cannot recall any occasions after high school when he smoked marijuana, but he admits that he used marijuana on at least one occasion because he had a positive drug screen for marijuana when he applied for employment at a business in the 1994 to 1996 time frame. TR at 112. The individual testified that he put the dates of marijuana use from 1999 until 2000 on his QNSP because "that's just what I thought then." TR at 120. He stated that these dates no longer seem accurate to him,

and he thinks he should have done "a little bit more research on it" before writing the dates on his QNSP. TR at 121.

The individual testified that the statement in the QNSP is accurate in reporting that he has only used marijuana four-to-five times in his life, but that the dates of usage on the QNSP are too recent in time, that his last usage marijuana occurred before his last failed drug test in the 1994-1996 time frame. TR at 121-122.

He also stated that he has not been in the presence of marijuana use since 2000 "unless it was in a club or I wasn't there with them or something like that. No, I don't associate with that." TR at 116. He stated that he has "definitely not" been around any drug dealers. He stated that his last positive drug test was in the mid-1990's. Id.

The individual stated that he and his ex-girlfriend had been together for fourteen years, and that they never used marijuana together. TR at 118. He stated that she assisted him in reporting his marijuana use on his QNSP. TR at 119.

With regard to his financial concerns, the individual testified that after his former credit union obtained a court judgment against him in 2002, he had agreed with the credit union to make monthly payments of \$100 on the balance of the debt involving his repossessed automobile. He stated that he stopped making these payments after a few months when his job with that employer was terminated. TR at 136-137. He stated that two other charged off accounts on his credit report were most likely doctor bills. He acknowledged that he had been in debt with the IRS, but had paid that debt. TR at 131.

The individual testified that since the May 2006 PSI, he has made an effort to retire the credit union debt. He stated that as of March 2007, he has paid \$910 on this debt. TR at 131-132, Individual's Exhibit 1. He stated that in October 2006, he entered into an agreement with the credit union to pay off the debt with monthly payments of \$130. However, he acknowledged that he has not made these payments on a regular basis and could not recall how many he made. TR at 134-135.

With regard to his current expenses, he stated that since he submitted his personal financial statements to the DOE in May and October 2006, his living situation has changed. He testified that he no longer lives with his former girlfriend and the two children they have together. He stated that he is paying child support to

her on an informal basis. He stated that he also is paying child support on an informal basis for a child that he fathered recently with another girlfriend. He testified that currently he is living by himself in an apartment and has monthly rent, utility and telephone expenses. He stated that currently his income is barely sufficient to meet his expenses. TR at 139.

The individual testified that he would submit a new personal financial statement within ten days of the hearing, along with documentation concerning payments that he has made on his outstanding debts. The individual agreed to deliver this information to the DOE Counsel at her office. TR at 140, 155-157.

C. The Individual's Brother

The individual's brother testified that he is one and a half years older than the individual, and that after he graduated from high school in 1990, he joined the Navy and was away from home until 1995-96. TR at 69-72. He testified that when he returned from the Navy he tried to show the individual how to pay his bills. He stated that when the individual was younger, he was somewhat immature about his job habits and finances, but he believes that becoming a father has made the individual more responsible. TR at 72-73, 70-71. He stated that he has never used marijuana and that he has never seen his brother use marijuana. Tr at 77-78, 82. He stated that he talks to the individual daily by telephone, and that they occasionally socialize together. TR at 70.

D. The Individual's Foreman

The individual's foreman testified that he has worked with the individual for two years and has been his foreman from time to time. He stated that he is impressed with the individual's work ethic, that he is conscientious, safety conscious, and willing to learn. He testified that the individual is friendly and gets along well with his co-workers. He stated that he has seen the individual outside the workplace at one or two co-worker birthday parties. TR at 42-49.

The individual's foreman testified that he and his other co-workers, including the individual, are subject to random drug testing. TR at 49. He stated that employees are aware that co-workers have been fired over positive drug tests. TR at 50.

E. The Individual's Friend/Co-Worker

The individual's friend/co-worker testified that he has known the individual for more than 7 years, and considers him one of his best friends. He testified that they both have children and that they coach football together. He stated that they also take their children to movies together. TR at 55-60. He stated that about once or twice a month he socializes with the individual without the children. He stated that he has never seen the individual use marijuana or abuse alcohol. TR at 63.

F. The Individual's Former Foreman/Social Acquaintance

The individual's former foreman testified that he was the individual's supervisor for three years and he became friendly with the individual during this period. He stated that the individual is a hard worker, has timely work habits, and an easy-going personality. He stated that they've had some limited social activity outside the workplace. He stated that he has never seen the individual do anything that would make him untrustworthy. TR at 83-88.

G. The Individual's Co-Worker

The individual's co-worker testified that he has worked with the individual for two years and has observed the individual to be hardworking, professional and well-liked in the workplace. He stated that the individual was eager to learn and was responsible with his work assignments. He stated his contact with the individual outside the workplace was limited to one or two social functions. He stated that he feels strongly that the individual should get his security clearance, and has never observed the individual do anything that would make him question that position. TR at 91-98.

H. The Individual's Additional Documentary Evidence

In addition to the information referred to above, the individual submitted letters from his minister, his barber, a family friend, a co-worker who has supervised his work, a plant safety facilitator, and a union steward. All of them state that the individual is well-mannered, supportive of his family and co-workers, and a responsible person. None of them directly address the individual's past or current marijuana use, or his financial issues. Individual Exhibits 2-7.

At the Hearing, the individual stated that within ten days of the hearing, he would deliver to the DOE Counsel documentation concerning payments made on his overdue accounts as well as a revised personal financial statement. In a telephone message left on November 27, 2007, the DOE Counsel reported to me that the individual never turned in the additional documentation discussed at the hearing, and has not provided any explanation for this.

I. The Individual's Credit Reports

At the hearing, the DOE security specialist testified that he would submit into the record a copy of the individual's November 2007 credit report, which would document the changes that had taken place in the individual's credit history since the May 2006 Credit Report, which served as the basis for concerns set forth in the Notification Letter. This report was received by me on November 29, 2007, along with a one-page handwritten comparison of relevant information between the two credit reports. The November 2007 credit report fails to confirm that the individual has made payments to reduce his charged off account with his former credit union. An unpaid bill for \$821 from May 2006 does not appear on the November 2007 report. However, the November 2007 report lists several unpaid medical bills for the period 2002-2007, including one from 2002 for \$1,121.

IV. ANALYSIS

The individual reported using marijuana between April 1999 and November 2000 on his 2005 QNSP. When asked about this use at his 2006 PSI, the individual stated that he could recall no specifics of his marijuana use in the middle and late 1990's. In his testimony at the hearing, he repeated that he could not remember any specific instances of marijuana use except at parties during and immediately after high school in the early 1990's, although he admits that he failed a drug test for marijuana in the 1994-1996 time frame, and must have used marijuana during this period. He asserts that he cannot remember why he reported on his QNSP that he used marijuana four to five times in the 1999-2000 time frame, but he asserts that he has not used marijuana since November 2000.

Based on his testimony, I find that the individual has not mitigated the DOE's Criterion (k) security concerns regarding his past use of marijuana. At the outset of the Hearing, I emphasized that the individual must provide complete information to resolve the concerns raised in the Notification Letter.

When [the individual] presents himself as a witness, it is in his best interest to answer questions fully and truthfully. An affirmative finding regarding eligibility for access authorization is possible only for individuals who cooperate by providing full, frank, and truthful answers to the DOE's relevant questions.

TR at 7. I do not accept the individual's repeated assertions that he cannot recall any specifics about his past use of marijuana. I agree with the security specialist's testimony that it is highly unusual that the individual can recall no specifics of his use of marijuana in the mid-1990's or later. TR at 128. Nor do I accept his assertion that he does not recall why he reported 4-5 instances of marijuana use in the 1999-2000 time frame on the QNSP that he completed in April 2005.

Anyone seeking access authorization must be willing to respond to questions about using marijuana in a candid and truthful manner. The limited or selective disclosure of information regarding a security concern cannot mitigate that concern. Indeed, the inability to be candid about his private life in this area indicates that the individual may not have been candid with the DOE in describing other events in his private life that may be embarrassing to him. Under these circumstances, I conclude that because the individual has not been candid in describing his past marijuana use, he has not mitigated the security concerns arising from that use. See Personnel Security Review (Case No. VSA-0038), 28 DOE ¶ 83,018 at 86,523 (2001) (The OHA Director concluded that an individual raised a security concern when he failed to disclose to the DOE the circumstances that resulted in a positive drug test. "Whether silence was the most natural reaction in this case is irrelevant. The key here is that a person seeking a security clearance is under a continuing obligation to be completely honest and open with the DOE, and to keep the DOE fully informed with regard to matters that bear on his access authorization.").

Nor has the individual established that he has not used marijuana since November 2000. The individual testified that he currently is subject to random drug testing, and has tested negative for marijuana use on two tests administered by his employer on November 9, 2004 and May 21, 2007. See DOE Exhibit 8. While these tests provide some support for his assertion, two negative drug tests in the space of two and a half years do not establish abstinence unless they are supported with other convincing corroborative evidence.

In my initial letter to the individual, I indicated that the individual needed to provide convincing witness testimony to support his claim of abstinence.

I encourage [the individual] to bring forth witnesses such as close friends and family members who are able to corroborate his testimony about his [past] marijuana use and/or his claim that he is not currently using marijuana.

August 23, 2007, letter to the parties at 2. Again, at our October 23, 2007, conference call, we discussed the need to provide witnesses who were knowledgeable about his private life. However, the individual failed to present convincing corroborative testimony at the hearing.

Although the individual testified that he had a relationship with his former girlfriend that lasted fourteen years, and that she assisted him in reporting his marijuana use on his QNSP, he did not present her as a witness. Nor did he present his current girlfriend as a witness. Both of these witnesses could have provided important corroboration that the individual is not using marijuana in his home environment. Of the witnesses that testified on his behalf at the hearing, I find that his brother and his long-time friend had significant knowledge of his private life. However, I find that neither of these witnesses necessarily would be aware of occasional marijuana use by the individual. Accordingly, the individual has not convinced me that he has not used marijuana in recent years.

The individual also has failed to mitigate the Criterion (1) financial concerns set forth in the Notification Letter. The individual contended at the hearing that his inability to pay off his credit union debt under a negotiated payment schedule was due to his termination of employment in 2002, and that his other outstanding debts are chiefly unpaid medical expenses. He asserts that his recent efforts to begin to pay off these outstanding debts should mitigate the DOE's concerns. I do not agree. The recently issued revision of the DOE's Adjudicative Guidelines does provide that a factor supporting mitigation of security concerns raised by an individual's financial problem is a showing that the problem was caused by conditions such as termination of employment or an unexpected medical emergency that were largely beyond a person's

control. ^{1/} However, this showing must be coupled with other factors supporting mitigation. These other factors include showings that: (1) the individual acted responsibly under the circumstances when dealing with the financial emergency; (2) there are clear indications that the individual's financial problem is being resolved or is under control; and (3) the individual has initiated a good faith effort to repay overdue creditors or otherwise resolve his debts. Id. As discussed above, the individual continues to have several significant overdue debts on his current credit report, and there is no clear indication of when or how he will resolve these debts. While he contends that he made a payment of \$910 on his credit union debt, this payment does not appear to be reflected on his November 2007 credit report. Nor did he follow through on his promise to document his claimed payments on other overdue accounts. The individual also admits that he has failed to comply with a payment agreement that he negotiated with his former credit union in 2006. Accordingly, I find that he has not met the Adjudicative Guidelines criteria for mitigating a financial problem.

Finally, I note that our past precedent has held that once there is an established pattern of financial irresponsibility, an individual must demonstrate a sustained, new pattern of financial responsibility sufficient to demonstrate that a recurrence of the past pattern is unlikely. See, e.g., Personnel Security Hearing (Case No. VSO-0108), 26 DOE ¶ 82,764 at 85,699 (1996). In the present case, the individual clearly has a long term pattern of failing to meet his financial obligations, including past problems with the Internal Revenue Service, and he has not provided any information which indicates that he is now able to meet his financial obligations. His failure to follow through on his promise to provide a revised financial statement is further evidence supporting the conclusion that the individual has not demonstrated financial responsibility. Moreover, the individual testified at the hearing that he has incurred additional monthly

^{1/} The "Adjudicative Guidelines Approved by the President in Accordance With the Provisions of Executive Order 12968", were originally published as an appendix to Subpart A of the Part 710 regulations at 66 Fed. Reg. 47061 (September 11, 2001). See Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, Guideline F, Paragraph 20, at <http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf> (December 29, 2005).

expenses since he broke up with his former girlfriend, including the support of an additional child that he fathered with his new girlfriend. It therefore appears that he is in a difficult financial situation with little of his current earnings available to resolve delinquent accounts or to use to pay emergency expenses.

Accordingly, I find that the individual has not mitigated the DOE's security concerns with respect to Criterion (1) arising from his past financial irresponsibility.

V. CONCLUSION

After considering all of the relevant information, favorable or unfavorable, in a comprehensive and common-sense manner, I find that the evidence and arguments advanced by the individual do not convince me that he has mitigated the DOE's Criteria (k) and (l) security concerns. Accordingly, I cannot find that granting the individual an access authorization would not endanger the common defense and would be clearly consistent with the national interest. 10 C.F.R. §§ 710.7(a), 710.27(a). It therefore is my conclusion that the individual should not be granted an access authorization. The individual may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Kent S. Woods
Hearing Officer
Office of Hearings and Appeals

Date: December 13, 2007